Supreme Court, U. S.
FILED
JAN 22 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1154

MILWAUKEE NEWSPAPER & GRAPHIC COMMUNICATIONS UNION, LOCAL NO. 23,
Petitioner,

v.

NEWSPAPERS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

DANIEL LEON SHNEIDMAN
735 West Wisconsin Avenue
Milwaukee, Wisconsin 53233
Counsel for Petitioner

Of Counsel:
HOWARD N. MYERS
ROBERT G. DOWLING
SHNEIDMAN, MYERS & GENDLIN
735 West Wisconsin Avenue
Milwaukee, Wisconsin 53233

January 18, 1979

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutes Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

1. The Decision of the Court of Appeals is in Conflict with the Preemption Principles of Federal Labor Law Jurisdiction Established in Prior Decisions of this Court 5

2. The Court of Appeals' Decision is Inconsistent with this Court's Interpretation of the Function and Purpose of Sec. 301(a) of the Labor-Management Relations Act of 1947 10

3. The Decision of the Court of Appeals is in Conflict with the Decisions of Several State Supreme Courts 12

4. This Case Involves a Significant Question of Federal Labor Law 13

Conclusion 16

Appendix

1. Decision and Order of the District Court, January 18, 1978 ..... A-1

2. Judgment and Opinion, Court of Appeals, October 26, 1978 ..... A-7

CITATIONS

Cases:

Arnold Co. v. Carpenters District Council, 417 U.S. 12 (1974) 9
Audit Services, Inc. v. Elmo Road Corp., 575 P.2d 77 (1978) 13

Building Service Employees, Local 252 v. Schlesinger, 440 Pa. 448, 269 A.2d 894 (1970) 13

Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 10, 16
Chattanooga Mailers, Local 92 v. Chattanooga News-Free Press Co., 524 F.2d 1305 (6th Cir. 1975) 11
Corvalis Sand & Gravel Co. v. Hoisting & Portable Engineers, 247 Ore. 158, 419 P.2d 38 (1966), cert. denied, 387 U.S. 904 (1967) 13

Ford Motor Co. v. NLRB, 571 F.2d 993 (7th Cir. 1978), cert. granted, 47 U.S.L.W. 3246 (U.S. Oct. 10, 1978) 14

Garner v. Teamsters Union, 346 U.S. 485 (1953) ..6, 7, 8, 16

NLRB v. Columbus Printing Pressmen, Local 252, 543 F.2d 1161 (5th Cir. 1976), enforcing 219 N.L.R.B. 268 (1975) 14
NLRB v. Greensboro Printing Pressman, Local 319, 549 F.2d 308 (4th Cir. 1977), enforcing 222 N.L.R.B. 893 (1976) 14
NLRB v. Ladish Co., 538 F.2d 1267 (7th Cir. 1976) 14
NLRB v. Massachusetts Nurses Association, 557 F.2d 894 (1st Cir. 1977) enforcing 225 N.L.R.B. 678 (1976) ... 14
NLRB v. Sheet Metal Workers International Association, Local 38, 575 F.2d 394 (3rd Cir. 1978) enforcing 231 N.L.R.B. No. 101 (1977) 14
Nordstrom, Inc., 229 N.L.R.B. 601 (1977) 15

Retail Clerks International Association v. Lion Dry Goods, 369 U.S. 17 (1962) 8

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 6
Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978) 5, 6, 16
Smith v. Evening News Association, 371 U.S. 195 (1962) 9
Stanwood Thriftmart, 216 N.L.R.B. 852 (1975) 16

Trust Fund Services v. Heyman, 88 Wash.2d 698, 565 P.2d 805 (1977), cert. denied, 434 U.S. 987 (1977) ..12, 13

United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960) 10, 11
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 10
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 10, 11

Statutes:

Labor Management Relations Act of 1947, as amended
Section 301, 29 U.S.C. Sec. 185 .....passim

National Labor Relations Act, as amended,
Section 8(a)(5), 29 U.S.C. Sec. 158(a)(5) 15
Section 8(b)(2), 29 U.S.C. Sec. 158(b)(2) 2, 8
Section 8(b)(3), 29 U.S.C. Sec. 158(b)(3) .....passim
Section 8(d), 29 U.S.C. Sec. 158(d) 2

Miscellaneous:

Sovern, "Section 301 and the Primary Jurisdiction of the NLRB," 76 Harv. L. Rev. 529 (1963) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. .....

MILWAUKEE NEWSPAPER & GRAPHIC COMMUNICATIONS UNION, LOCAL NO. 23,
Petitioner,

v.

NEWSPAPERS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Petitioner, Milwaukee Newspaper & Graphic Communications Union Local No. 23 (herein "Union") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 26, 1978.

OPINIONS BELOW

The Decision and Order of the District Court for the Eastern District of Wisconsin of January 18, 1978 is unreported (Appendix, page 1). The opinion of the court of appeals is reported at 586 F.2d 19 (7th Cir. 1978). (Appendix, page 7).

JURISDICTION

The per curiam opinion of the court of appeals was entered on October 26, 1978. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

In an action to compel arbitration under Section 301(a) of the Labor Management Relations Act, does the district court have jurisdiction to consider and determine a defense that Section 8(b)(3) of the National Labor Relations Act has been violated?

STATUTES INVOLVED

The relevant portions of Sections 8(b)(3) and 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. Secs. 158 (b)(3) and 158(d), are set forth below:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (3) to refuse to bargain collectively with an employer.
>
> . . .

> Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

The relevant portion of Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 185, is set forth below:

> Sec. 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Union is the collective bargaining representative of certain of the employees of the respondent, Newspapers, Inc. (herein the "Company"), which is a publisher and distributor of daily newspapers. The Union and Company are parties to a collective bargaining agreement, the latest being in effect from June 1, 1974 to August 31, 1976, which has continued beyond said date pursuant to the agreement itself.

The labor agreement contains an arbitration clause whereby "all questions . . . including disagreements arising in negotiations with respect to a new contract . . ." are to be referred to arbitration. After extensive negotiations, the parties were unable to reach agreement on a complete, new contract. The unresolved issues included, *inter alia*, the term of the contract, manning requirements, wages, hours, vacations, health and welfare benefits, discharge and appeal procedures, and whether the existing arbitration clause should be included, modified, or deleted in the new contract. Subsequently, the Union invoked the arbitration procedure regarding all unresolved issues. The Company,

however, refused to submit all of the unresolved issues to the arbitrator.

On May 2, 1977 the Union commenced this action in the United States District Court for the Eastern District of Wisconsin pursuant to Sec. 301(a) of the Labor Management Relations Act, 29 U.S.C. Sec. 185, seeking to compel the Company to refer all of the unresolved issues to arbitration. The Company moved to dismiss the action on the ground that the Union had not stated a claim upon which relief could be granted. The Union moved for summary judgment. In its brief in support of its motion to dismiss, the Company agreed to submit to arbitration all issues other than the dispute over inclusion, modification, or deletion of an arbitration clause in the new contract. With respect to the arbitration provision, the Company took the position that even though the existing arbitration clause was sufficiently broad on its face to cover the dispute in question, the Union's insistence that the issue be submitted to arbitration constituted a violation of Sec. 8 (b)(3) of the National Labor Relations Act and, therefore, the contractual promise to arbitrate could not be enforced with respect to that issue.

The district court entered a judgment requiring the Company to submit to arbitration all disagreements over the terms of the new contract, except the issue of whether the new contract should include an interest arbitration clause. In denying the Union's motion for summary judgment on the question of submission to arbitration of the dispute over inclusion, modification, or deletion of the arbitration clause, the district court found that the Union's insistence upon arbitration of the continued interest arbitration provision violated Sec. 8(b)(3) of the National Labor Relations Act and, therefore, enforcement of the existing arbitration clause with respect to that issue would be against public policy. In a per curiam decision, the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court upon the same grounds.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Is in Conflict With the Preemption Principles of Federal Labor Law Jurisdiction Established in Prior Decisions of This Court.

In affirming the district court's decision, the court of appeals concluded that the lower court had jurisdiction to consider and determine the Company's defense that the Union had violated Sec. 8(b)(3) of the National Labor Relations Act and that, in fact, the Union's conduct did constitute an unfair labor practice. It is submitted that the court of appeals' conclusion that the district court had jurisdiction to decide the unfair labor practice question is in conflict with the principles of preemption established in prior decisions of this Court and is not supported by the cases relied upon by the court of appeals.

This Court has on several occasions considered both the nature of the exclusive jurisdiction of the National Labor Relations Board and attempted encroachments upon that jurisdiction. These decisions and the history of the doctrine of NLRB preemption were recently discussed by the Court in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180 (1978). There, the Court considered the question of whether the state court was preempted from considering Sears' suit to enjoin peaceful and orderly union picketing on its property. In deciding this question, the Court noted that its earliest decisions in this area established the proposition that:

> "The interest in uniform development of the new national labor policy required that matters which fell squarely within the regulatory jurisdiction of the Federal Board be evaluated in the first instance by that agency." 436 U.S. at 191.

In *Sears, supra,* the Court next reviewed its decision in *Garner v. Teamsters Union,* 346 U.S. 485 (1953), in which it had held that an employer grievance against a union which may be presented to the National Labor Relations Board is not subject to litigation in a state tribunal. The conduct in controversy was arguably prohibited by federal law and, therefore, state jurisdiction was preempted. The rationale for preemption stated in *Garner* was again adopted by the Court in *Sears*:

> " 'Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. *The reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so.* Cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 346 U.S. at 490-491. (footnote omitted)
>
> " 'The conflict lies in remedies . . . [W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent.' Id., at 498-499." 436 U.S. at 192-193 (emphasis added).

The Court in *Sears* also reviewed its decision in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). The Court noted that in that case it had established the general guidelines regarding the permissible scope of state regulation of

activity touching upon labor-management relations. 436 U.S. at 187. Those guidelines are as follows:

> "When an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States *as well as the Federal Courts* must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245 (emphasis added).

In applying the *Garmon* principle to the facts in *Sears,* the Court stated that when the activity in question is arguably prohibited by the National Labor Relations Act, the critical inquiry is:

> "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation [i.e. when the controversy is identical] that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid." 436 U.S. at 197.

And, when the activity in question is arguably protected by the National Labor Relations Act, the rule is that "when the same controversy may be presented to the state court or to the NLRB, it must be presented to the Board." Id. at 202. The Court cautioned, however, that the rationale for this rule did not apply "when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so." Id. at 202-203.

The Court concluded that the state court was not preempted from considering Sears' suit. This was because the controversy which Sears might have presented to the Board was not the

same controversy present in the suit, Id. at 198, and Sears had no acceptable method of invoking, or inducing the union to invoke, the jurisdiction of the NLRB. Id. at 201-202.

Here, unlike Sears, the Company unquestionably had the ability to submit the issue raised in its defense to the National Labor Relations Board, but simply chose not to. Moreover, the very issue raised by the Company and decided by the lower court is the very question that would have been presented to the Labor Board, i.e. whether, under all the facts and circumstances, the Union had violated Sec. 8(b)(3) of the National Labor Relations Act. Thus, application of the principles of preemption established in *Garner, Garmon,* and *Sears* to this case leads to the conclusion that the lower court improperly addressed itself to the question of whether the Union had committed an unfair labor practice.

Although *Garner, Garmon,* and *Sears* dealt with preemption of state court jurisdiction, the principles established in those cases are equally applicable to the question of whether a federal court in an action brought under Sec. 301(a) of the Labor-Management Relations Act can make a determination of whether an unfair labor practice has been committed. This limitation upon the federal courts was noted in *Garner* and *Garmon,* as shown above, and was also recognized by the Court in *Retail Clerks International Association v. Lion Dry Goods,* 369 U.S. 17 (1962). In *Lion Dry Goods* the Court enforced a strike settlement agreement in an action under Sec. 301(a) despite the fact that the union seeking enforcement was arguably a minority union and thus a settlement agreement would be in violation of Sec. 8(b)(2) of the National Labor Relations Act. On this issue the Court stated:

> "Lastly, if the Federal Courts' jurisdiction under Sec. 301 (a) required a preliminary determination of the representative status of the labor organization involved, potential conflict with the National Labor Relations Board would be increased . . . and litigation would be much hindered." 369 U.S. 29 (citations omitted).

In an article entitled "Section 301 and the Primary Jurisdiction of the NLRB," 76 Harv. L. Rev. 529 (1963), Professor Michael Sovern noted the significance of the Court's decision on this question. Professor Sovern concluded that in the *Lion Dry Goods* decision the Court had taken the position that in suits on collective bargaining agreements the courts are to ignore the employer's defense that enforcement of the settlement agreement will require it to violate the National Labor Relations Act because the Union lacked majority support when the agreement was made. Id. at 542-543.

In its decision, the court below recognized that the question of whether invocation of the arbitration procedure with respect to the issue of inclusion, modification, or deletion of an arbitration clause in the new contract is a refusal to bargain is a matter within the expertise and jurisdiction of the Board. (Appendix, page 10) It nevertheless concluded that the district court had jurisdiction to consider the matter, citing *Arnold Co. v. Carpenters District Council,* 417 U.S. 12 (1974); and *Smith v. Evening News Association,* 371 U.S. 195 (1962). (Appendix, page 10) It is submitted that the court of appeals' reliance upon these decisions is misplaced and that they are not controlling. Both cases involved factual situations where the party's conduct which constituted the breach of contract was also arguably an unfair labor practice. This Court held that the mere fact that the same conduct of the defendant might also constitute an unfair labor practice did not prevent the court from proceeding under Sec. 301 with the breach of contract action. In neither case did this Court state or imply that the lower court could consider and rule on the unfair labor practice question. In contrast, in this action it is the party bringing suit for enforcement of the contract that is alleged to have committed the unfair labor practice, and here the lower court specifically decided the unfair labor practice question.

2. **The Court of Appeals' Decision Is Inconsistent With This Court's Interpretation of the Function and Purpose of Sec. 301(a) of the Labor Management Relations Act of 1947.**

In *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), this Court stated:

> "The Labor-Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Sec. 301(a) reflects congressional recognition of the vital importance of insuring the enforceability of such agreements." Id. at 509.

In the "Steelworkers Trilogy," *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court discussed at length the policy considerations underlying enforcement of agreements to arbitrate under Sec. 301(a). The Court noted that the federal policy was to promote industrial stabilization through collective bargaining agreements (and agreements to arbitrate). The Court defined the judicial function in determining whether to enforce an agreement to arbitrate a labor dispute under Sec. 301(a) as:

> ". . . whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. *Yet, to be consistent with Congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under Section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made.* An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. at 582-583. (emphasis added)

In *United Steelworkers v. American Manufacturing Co., supra*, the Court said,

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." 363 U.S. at 567, 568.

The district court erred under Sec. 301(a) by considering and determining that the Union had committed an unfair labor practice. By not limiting its consideration to the terms of the contract and the existence of any breach, the court thwarted the legislative purpose of ensuring parties to a collective bargaining agreement that the contract they negotiated would be honored. Moreover, federal labor policy favors the enforcement of interest arbitration agreements just as it favors the enforcement of grievance arbitration agreements. See *Chattanooga Mailers, Local 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305 (6th Cir. 1975).

3. **The Decision of the Court of Appeals Is in Conflict With the Decisions of Several State Supreme Courts.**

The Washington Supreme Court has held that a federal district court lacks jurisdiction under Sec. 301(a) to rescind a contract on the ground that the contract involved an unfair labor practice because the union did not represent a majority of the employees at the time the contract was signed. *Trust Fund Services v. Heyman,* 88 Wash.2d 698, 565 P.2d 805 (1977), cert. denied, 434 U.S. 987 (1977).

In that case, the assignee of the union trust fund brought an action to recover payments due from the employer pursuant to a collective bargaining agreement. The employer raised as a defense a contention that the union did not represent a majority of the employees at the time the agreement was signed. While the state court action was pending, the employer brought suit in federal district court under Sec. 301(a) for rescission of the contract on the ground that it involved an unfair labor practice. After the lower state court case was decided in favor of the assignee, the federal court granted rescission of the contract. The union did not appeal from the federal court judgment, but, instead, while that case was pending, filed a charge against the employer with the NLRB based upon the employer's repudiation of the agreement. The Board determined that the employer had engaged in an unfair labor practice in repudiating the contract and petitioned the 9th Circuit Court of Appeals for enforcement. That court denied enforcement of the NLRB order on the ground that the district court judgment on the question of the validity of the contract was res judicata and binding upon the NLRB.

On appeal from the lower state court decision, the employer argued that the state court was required to follow the decision of the federal district court and hold the contract invalid. The Washington Supreme Court held that the decisions of the district court and the court of appeals were not controlling precedent because the district court lacked jurisdiction under Sec. 301(a)

to set aside a contract and, in particular, to set it aside on the ground that an unfair labor practice was involved. It held that the NLRB has exclusive original jurisdiction to determine unfair labor practices and that the federal courts must defer to the exclusive competence of the NLRB. The Washington Supreme Court also noted that the Supreme Court of Oregon and the Pennsylvania Supreme Court had reached similar conclusions. *Corvalis Sand & Gravel Co. v. Hoisting & Portable Engineers,* 247 Ore. 158, 419 P.2d 38 (1966), cert. denied, 387 U.S. 904 (1967); *Building Service Employees, Local 252 v. Schlesinger,* 440 Pa. 448, 269 A.2d 894 (1970).

The *Trust Fund Services* decision has recently been followed by the Montana Supreme Court. *Audit Services, Inc. v. Elmo Road Corp.,* 575 P.2d 77, 83 (1978).

4. **This Case Involves a Significant Question of Federal Labor Law.**

At issue here is whether it is the National Labor Relations Board, the body to whom Congress has specifically assigned the task, or a court hearing an action brought under Sec. 301(a), that is to make the initial decision as to whether, under all the facts and circumstances, an unfair labor practice has been committed. If a court in a Sec. 301(a) action is allowed to make findings and conclusions of unfair labor practice charges, then the Congressional intent in establishing a centralized and uniform administration of the National Labor Relations Act will be frustrated and labor and management alike will be denied the special expertise the Board has developed in investigating and deciding unfair labor practices. Moreover, by holding that the lower court does not have jurisdiction to consider the claimed unfair labor practice will not deprive the Company of an opportunity to pursue its claim. The Company had every oppor-

tunity to present that question to the NLRB, but simply chose not to.

It is evident that in concluding that the Union violated Sec. 8(b)(3) the lower court did exactly what Congress intended to avoid. Implicit in the lower court's judgment that the Union had violated Sec. 8(b)(3), were the conclusions that: (1) the inclusion of an interest arbitration clause in *this* new contract was a non-mandatory subject of bargaining; and (2) the Union had insisted to impasse upon its inclusion in the new contract. In reaching these conclusions, the lower court did not have any facts, circumstances, or record upon which to decide whether an unfair labor practice had been committed. Instead, it simply relied upon and followed the holdings in cases in which other courts of appeals had, upon the particular facts and circumstances found therein, enforced Board orders. *NLRB v. Sheet Metal Workers International Association, Local 38*, 575 F.2d 394 (3rd Cir. 1978), enforcing 231 N.L.R.B. No. 101 (1977); *NLRB v. Massachusetts Nurses Association*, 557 F.2d 894 (1st Cir. 1977), enforcing 225 N.L.R.B. 678 (1976); *NLRB v. Greensboro Printing Pressmen, Local 319*, 549 F.2d 308 (4th Cir. 1977), enforcing 222 N.L.R.B. 893 (1976); *NLRB v. Columbus Printing Pressmen, Local 252*, 543 F.2d 1161 (5th Cir. 1976), enforcing 219 N.L.R.B. 268 (1975). (Appendix, page 9)

However, the issue of whether a particular subject is a mandatory subject of bargaining is both legal and factual and cannot be resolved by consideration of legal principles alone. What may be considered a non-mandatory subject of bargaining in one factual context may be found to be a mandatory subject of bargaining in another. Compare, for example, *Ford Motor Co. v. NLRB*, 571 F.2d 993 (7th Cir. 1978), cert. granted 47 U.S.L.W. 3246 (U.S. Oct. 10, 1978), with *NLRB v. Ladish Co.*, 538 F.2d 1267 (7th Cir. 1976).

Similarly, the question of whether a party has insisted to impasse upon the inclusion of a non-mandatory subject of bargaining cannot be answered in the abstract. The particular facts of the case must again be considered. For example, each of the cases cited and relied upon by the court of appeals involved a situation where the *only* issue sought to be submitted to interest arbitration was the inclusion of an interest arbitration clause in the new contract. In this case, on the other hand, the inclusion of the interest arbitration clause was only one of many disputed issues which the Union sought to submit to arbitration. Those issues which were in dispute other than the interest arbitration clause were clearly mandatory subjects of bargaining. It is submitted that this critical difference in facts would have led the Board to conclude that the Union had not insisted to impasse upon the inclusion of a new interest arbitration clause, in accordance with the principles enunciated by the Board in *Nordstrom, Inc.*, 229 N.L.R.B. 601 (1977).

In *Nordstrom* the following series of events occurred during negotiations of a collective bargaining agreement: (1) the company made an initial wage proposal; (2) the union countered with a higher wage demand than offered by the company; (3) after further consideration, the union offered to accept the company's wage proposal, provided that the wage increase would be implemented with higher initial increases; (4) in response, the company renewed its original wage proposal, but added three conditions which were characterized as non-mandatory subjects of bargaining; and (5) the union sought to accept the employer's original wage proposal without the three additional demands. When the employer declined to drop the additional demands, the union filed a complaint with the NLRB claiming that the company had violated Sec. 8(a)(5) of the National Labor Relations Act by insisting to impasse upon a non-mandatory subject of bargaining. The NLRB held, however, that the company had not violated Sec. 8(a)(5) because of the arguable bearing the non-mandatory demands had upon its position on wages, a mandatory subject of bargaining.

It should also be noted that state courts, as well as the federal courts, can hear suits for violation of collective bargaining contracts. *Charles Dowd Box Co. v. Courtney, supra.* Thus, a logical extension of the decision of the court below would be that state courts could also consider and determine unfair labor practice charges in such suits. However, such a result would be antithetical to the preemption principles established in *Garner, Garmon,* and *Sears, supra.*

Finally, the significance of the issue involved in this case, and the need for its resolution, is evident by the fact that the National Labor Relations Board itself takes the position that only it has the jurisdiction to determine initially whether or not a party in a Sec. 301 action has committed an unfair labor practice. *Stanwood Thirftmart,* 216 N.L.R.B. 852, 853 (1975).

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of certiorari be issued to review the judgment and opinion of the court of appeals.

Respectfully submitted,

DANIEL LEON SHNEIDMAN
735 West Wisconsin Avenue
Milwaukee, Wisconsin 53233
Counsel for Petitioner

Of Counsel

HOWARD N. MYERS
ROBERT G. DOWLING
SHNEIDMAN, MYERS & GENDLIN
735 West Wisconsin Avenue
Milwaukee, Wisconsin 53233
Telephone: (414) 271-8650

January 18, 1979

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Milwaukee Newspaper & Graphic Communications Union,
Local No. 23,
Plaintiff,

v.

Newspapers, Inc.,
Defendant.

C.A. No. 77-C-255

DECISION AND ORDER

(Filed Jan. 18, 1978)

The plaintiff, Milwaukee Newspaper & Graphic Communications Union, Local No. 23 (hereinafter the "Union"), has brought this action seeking declaratory and injunctive relief compelling the defendant, Newspapers, Inc. (hereinafter the "Company") to submit to arbitration of certain contractual terms for inclusion in a new labor agreement between the parties. The action is brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Pending before the Court is the motion of the Union for summary judgment and the motion of the Company for dismissal for failure to state a claim. For the reasons stated below, the Union's summary judgment motion is granted in part and denied in part, and the Company's motion to dismiss is granted in part and denied in part.

The Union and the Company presently are operating under the terms of a contract which has expired but which they have agreed is to continue to control until a new agreement is reached.

The expired contract provided for two types of arbitration, grievance arbitration and interest arbitration. Grievance arbitration concerns the submission to an arbitrator for decision of disputes over the interpretation or meaning of the existing terms of the contract. Interest arbitration concerns the submission to an arbitrator for decision of disputes over what terms are to be included in a new agreement between the parties. Through this device of interest arbitration the Company and the Union have agreed to have the terms of the new contract determined by arbitration if the Company and the Union are unable to agree on the new terms.

In this lawsuit the Union has charged that an impasse has been reached in negotiations for certain terms of the new contract but that the Company refuses to submit to arbitration of those terms in violation of the existing interest arbitration agreement. The Union seeks only to have the Company compelled to honor the interest arbitration agreement by submitting to arbitration of the new terms. By way of response, the Company has stated that it is willing to submit to interest arbitration of all proposed contractual terms but one. That one term involves whether or not a new interest arbitration clause should be included in the new contract. The Company does not want to submit the proposed new interest arbitration clause to an arbitrator. Thus, the sole issue in this lawsuit and in the Union's motion for summary judgment and the Company's motion for dismissal is whether or not the Company should be required to submit to interest arbitration on the inclusion of an interest arbitration clause in the new contract.

Three recent decisions have addressed this problem and found that it is an unfair labor practice in violation of Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., for a union to insist to an impasse on having an interest arbitration clause included in a new contract. *N.L.R.B. v. Columbus Printing Pressmen and Assistants Union No. 252*, 543 F.2d

1161 (5th Cir. 1976); *N.L.R.B. v. Greensboro Printing Pressmen Union No. 319*, — F.2d —, 81 L.C. ¶ 13,011 (4th Cir. 1977); *N.L.R.B. v. Massachusetts Nurses Association*, — F.2d —, 81 L.C. ¶ 13,291 (1st Cir. 1977). The rationale of these cases is that an interest arbitration clause is a non-mandatory bargaining topic, that is, a topic having no close connection to wages, hours, or terms of employment, which are the topics about which the parties must bargain in good faith. A party who insists upon such a non-mandatory bargaining topic to the point of impasse in negotiations commits an unfair labor practice. The Company in the case at hand maintains that these cases established that the national labor policy is against submitting to interest arbitration disputes over inclusion of interest arbitration clauses in new contracts, and that, therefore, the submission of such a clause to arbitration would be unlawful.

The Union, on the other hand, argues that the interest arbitration clause of the contract now in effect contains no exceptions, and that, therefore, the present dispute of a new interest arbitration clause must itself be submitted to interest arbitration. Citing *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960), and other cases, the Union points out that federal labor policy strongly favors broad interpretation of arbitration clauses in labor agreements. The Company does not take issue with this preference of federal labor policy for arbitration and even agrees that the interest arbitration clause under the existing agreement is sufficiently broad on its face to cover the present dispute over inclusion of an interest arbitration clause in the new contract. However, the Company argues that for the reasons set forth in *Columbus Printing Pressmen*, supra, the matter of interest arbitration of a new interest arbitration clause must be taken as an exception to the national policy in favor of arbitration. The Court agrees with this contention by the Company. If interest arbitration clauses were themselves subject to interest arbitration, there would be a tendency for such clauses to be perpetuated in each

successive contract, with a consequent upsetting of the traditional collective bargaining framework in which a union and a company each are free at some point to resort to lawful use of economic weaponry to obtain desired contractual terms. To the extent that interest arbitration clauses would be self-perpetuating, both sides would be continually barred from bringing lawful economic pressure to bear. *Columbus Printing Pressmen*, supra.

In an attempt to distinguish the three cases finding it an unfair labor practice to insist upon inclusion of an interest arbitration clause in a new contract, the Union correctly points out that those cases dealt with N.L.R.B. proceedings under the unfair labor practice section of the N.L.R.A., while the present case is a suit for enforcement of a contract term under § 301 of the Labor Management Relations Act. This distinction, however, does not make a real difference for the reason that the three unfair labor practice cases are declarative of N.L.R.B. policy with regard to contract inclusion of interest arbitration clauses, and a Court should not violate such labor policy by taking contrary actions in the context of a Section 301 enforcement proceeding. The Union does not argue that it would not be found guilty of an unfair labor practice for its insistence to impasse upon inclusion of a new interest arbitration clause if the Company had sought to have such a proceeding brought. Yet, by seeking to have the Court issue a Section 301 order for interest arbitration of a new interest arbitration clause, the Union is seeking the anomalous result of having the Court implicitly approve Union action, unlawful bargaining to an impasse, which is violative of N.L.R.B. determinations of policy. The Court declines to issue such an order requiring interest arbitration of the contract inclusion of a new interest arbitration clause.

The Union argues further, citing *Nordstrom v. Retail Store Employees Union Local No. 1001*, 229 N.L.R.B. No. 70 (May

18, 1977), that the Court should order enforcement of the existing interest arbitration agreement because in this case, unlike *Columbus Printing Pressmen*, supra, the proposed interest arbitration clause is inextricably linked with bargaining over wages, hours, and conditions of employment. This inextricable link is said to arise from the Union's primary concern for job security for its members, which is said to arise from having an interest arbitration clause in any new contract. The inextricable link is thus claimed to render the proposed interest arbitration clause a mandatory topic of bargaining, as to which there could be no unfair labor practice. However, the Court does not accept this argument by the Union. The asserted nexus between the proposed interest arbitration clause and the mandatory bargaining subjects of wages, hours, and conditions of employment is simply too tenuous to render the proposed interest arbitration clause anything but a permissive subject of bargaining. *Nordstrom* is not controlling because the matter found to be a mandatory bargaining subject in that case was not an interest arbitration clause.

For the foregoing reasons the Court has determined that the Union's motion for summary judgment must be denied and the Company's motion for dismissal must be granted with regard to the issue of whether or not the Company is to be compelled to submit to interest arbitration of the dispute over inclusion of a new interest arbitration clause in the new contract. The Company need not submit to interest arbitration over such a clause. However, since the Company agreed in its brief in support of defendant's motion to dismiss to submit to interest arbitration over all other matters requested by the Union's complaint, the Union's motion for summary judgment will be granted and the Company's motion for dismissal will be denied with regard to the other topics as to which the Union is seeking interest arbitration.

IT IS THEREFORE ORDERED that the motion of the Milwaukee Newspaper & Graphic Communications Union,

Local No. 23, for summary judgment is denied insofar as it seeks to have Newspapers, Inc. compelled to submit to arbitration of the dispute over the inclusion of an interest arbitration clause in the new contract.

IT IS FURTHER ORDERED that the motion of the defendant Newspapers, Inc. for dismissal of the complaint is granted with regard to the plaintiff's request that the Court order the defendant to submit to interest arbitration of the dispute over the inclusion of an interest arbitration clause in the new contract.

IT IS FURTHER ORDERED that the motion of Milwaukee Newspaper & Graphic Communications Union, Local No. 23, for summary judgment is granted and the motion of the defendant Newspapers, Inc. for dismissal is denied in all respects other than as provided in the two preceding paragraphs.

Dated at Milwaukee, Wisconsin, this 18 day of January, 1978.

/s/ JOHN W. REYNOLDS, Chief Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-1286

Milwaukee Newspaper & Graphic Communications
Union Local No. 23,
Plaintiff-Appellant,

v.

Newspapers, Inc.,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin

No. 77-C-255—John W. Reynolds, Judge

Submitted October 4, 1978—Decided October 26, 1978.

Before Judges Swygert, Sprecher, and Tone, *Circuit Judges.*

Per Curiam. The sole issue in this appeal is whether a party to a collective bargaining contract containing an interest arbitration clause, *i.e.*, a clause requiring disagreements arising in negotiations for a new contract to be submitted to arbitration, is entitled to require the submission to arbitration of the unresolved issue of the inclusion of a similar interest arbitration clause in a new collective bargaining contract. On motion of the appellee and after considering the record and the briefs, we affirm without oral argument pursuant to our Circuit Rule 15, answering the question in the negative.

Newspapers, Inc. and the Milwaukee Newspaper & Graphic Communications Union Local No. 23 are parties to a collective

bargaining agreement which according to its terms expired in 1976 but which continues to control by agreement of the parties until a new agreement is reached. The contract contains an interest arbitration clause whereby "all questions . . . including disagreements arising in negotiations with respect to a new contract . . ." are to be referred to arbitration. After negotiation between the company and the union had failed to produce a new contract, the union invoked the interest arbitration procedure regarding all unresolved issues. The company refused to submit certain unresolved issues to the arbitrator, including whether an interest arbitration clause should be included in the new contract.

The union commenced this action pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1947),[1] seeking to compel the company to refer the unresolved issues to arbitration. Upon the company's motion to dismiss and the union's cross-motion for summary judgment, the court entered a judgment requiring the company to submit to interest arbitration all disagreements over the terms of the new contract except the issue of whether the new contract should include an interest arbitration clause. The union appeals. We affirm.

Four circuits have recently affirmed the National Labor Relations Board's finding that it is an unfair labor practice in vio-

---

[1] Section 8(b)(3) provides in pertinent part that it is an unfair labor practice for a union "to refuse to bargain collectively with an employer." Section 8(d) provides that:

> to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . and the execution of a written contract incorporating any agreement reached if requested by either party.

lation of Section 8(b)(3) of the National Labor Relations Act[2] for a union to insist to an impasse on the inclusion of an interest arbitration clause in a new contract. *N.L.R.B. v. Sheet Metal Workers International Association, Local Union No. 38*, 575 F.2d 394 (3rd Cir. 1978), *enforcing* — NLRB — (1977); *N.L.R.B. v. Massachusetts Nurses Association*, 557 F.2d 894 (1st Cir. 1977), *enforcing* 225 NLRB 678 (1976); *N.L.R.B. v. Greensboro Printing Pressmen Union No. 319*, 549 F.2d 308 (4th Cir. 1977), *enforcing* 222 NLRB 893 (1976); *N.L.R.B. v. Columbus Printing Pressmen & Assistants' Union No. 252*, 543 F.2d 1161 (5th Cir. 1976), *enforcing* 219 NLRB 268 (1975). The rationale of these cases and underlying Board decisions is that an interest arbitration clause is a nonmandatory subject of bargaining and therefore insisting to impasse on the inclusion of such a clause in a contract is a refusal to bargain under Section 8(b)(3). The policy behind this rule is aptly stated in *Columbus Printing Pressmen & Assistants' Union:*

> There are several important reasons why a new contract arbitration clause should not be enforceable to perpetrate the inclusion of the clause in successive bargaining agreements. The contract bargaining system could be self-perpetrating: a party, having agreed to the provision, may find itself locked into that procedure for as long as the bargaining relationship endures. . . . Parties may justly fear that the tendency of arbitrators would be to continue including the clause, for that is exactly what happened in this case . . . the perpetration of contract arbitration clauses in successive contracts may well serve to increase industrial unrest.

---

[2] Section 301(a), 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

> Under contact arbitration an outsider imposes contract terms. . . . In these circumstances, a disappointed party can readily believe that the arbitrator lacked appreciation of its needs. . . . The likelihood that one party will feel aggrieved by a contract arbitration award increases as parties move from contract to contract.

543 F.2d at 1169-70.

The union argues that the cited cases are distinguishable because each involved, not an action under § 301 to enforce a contract provision, but a review of a Board order. In each of the four cited cases there was a prior Board decision holding that an attempt to invoke an interest arbitration clause to obtain a similar clause in a new contract was a refusal to bargain under Section 8(b)(3), while in the present case there has been no prior Board determination of liability. Thus, the union argues that under the preemption doctrine most recently reaffirmed in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 46 L.W. 4446 (May 15, 1978), the district court did not have jurisdiction to determine whether enforcement under Section 301 would violate Section 8(b)(3). In addition, the union argues that it would not be an unfair labor practice for it to insist to impasse on the point in question and that the national policy favoring arbitration supports its position.

It is true that the question of whether or not an attempt to invoke the arbitration procedure in order to obtain a similar interest arbitration clause is a refusal to bargain is a matter within the expertise and jurisdiction of the Board. Nonetheless, the district court did have jurisdiction to resolve the Section 301 suit. *Arnold Co. v. Carpenters District Counsel*, 417 U.S. 12, 15-16 (1974); *Smith v. Evening News Association*, 371 U.S. 195, 198 (1962).

Even though the Board has not ruled on the specific facts before us, those facts are governed by a well-established Board

doctrine, and it cannot be plausibly argued that the doctrine is inapplicable. We owe great deference to the Board's determination in this area. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 (1971). The Board's policy as reflected in the four cited unfair labor practice cases from other circuits should not be flouted by a court in a Section 301 enforcement action.

The judgment of the district court is affirmed.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit